Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-134–03 OF 2020
ONG CHEE KWAN JC
21 AUGUST 2020

Construction Law — Construction contracts — Adjudication of payment disputes — Claim for non-payment of certified sums for work done — Whether judgment issued by High Court pursuant to s 28(2) of Construction Industry Payment and Adjudication Act 2012 was disputed debt — Whether company could raise cross-claim or counterclaim of amount equivalent to or more than debt in answer to justify grant of injunction to restrain presentation of winding up petition — Whether plaintiff had established bona fide cross-claim or counterclaim on substantial grounds — Companies Act 2016 s 466 — Construction Industry Payment and Adjudication Act 2012 s 28(2)

By way of a letter of acceptance dated 31 July 2018 and subcontract agreement dated 22 January 2019 ('the subcontract'), the plaintiff appointed the defendant as its subcontractor for a project known as 'Pavement Works (WP700) for Proposed Lebuhraya Putrajaya to KLIA (MEX II) — Commencing from Putrajaya Interchange and Terminating at KLIA'. In breach of the subcontract, the plaintiff failed to pay the defendant a total sum of RM8,848,865.04 under interim payment certificates No 2 to 7, all of which were certified and issued by the plaintiff to the defendant for works done pursuant to the subcontract. Because of the plaintiff's repeated non-payments, and after the service of the payment claim by the defendant on 22 April 2019 and the payment response by the plaintiff on 7 May 2019, the defendant commenced an adjudication proceeding under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') against the plaintiff and the notice of adjudication was sent by the defendant to the plaintiff on 21 May 2019. In the course of the adjudication proceeding, the defendant elected to accept the plaintiff's repudiation of the subcontract for repeated breaches of its payment obligations under the subcontract. The plaintiff issued an arbitration notice dated 20 August 2019 to the defendant. The arbitration proceedings between the parties was currently at the stage where an arbitrator is to be appointed by the Asian International Arbitration Centre ('AIAC'). On 21 August 2019, the learned adjudicator delivered his decision ('the adjudication decision') in favour of the defendant. Due to the plaintiff's failure to comply with the adjudication decision, the defendant had sought to enforce the adjudication decision in the Construction High Court at Kuala Lumpur ('the Construction High Court') pursuant to s 28 of the CIPAA. On 4 February 2020, the Construction High Court allowed the defendant's

Originating Summons No WA-24C-191–09 of 2019 ('OS 191') to enforce the adjudication decision as if it was a judgment or order of the High Court with interests and costs ('the judgment'). At the same time, the plaintiff's Originating Summon Nos WA-24C198–10 of 2019 and WA-24C-199–10 of 2019 ('OS 198 and 199') to set aside and to stay the adjudication decision pursuant to ss 15 and 16 of the CIPAA were both dismissed by the Construction High Court. The plaintiff did not appeal against the decisions of the Construction High Court. On 20 February 2020, the defendant by way of its solicitors issued to the plaintiff the statutory notice pursuant to s 466(1) of the Companies Act 2016 claiming for the sum of RM9,222,205.75. The originating summons was filed by the plaintiff known as a Fortuna injunction to restrain the defendant from, inter alia, commencing a winding up petition against the plaintiff pursuant to the statutory notice. The legal issues for consideration were: (a) whether a judgment issued by the High Court pursuant to s 28(2) of the CIPAA was a 'disputed debt' where there was concurrent arbitration or court proceedings; (b) if the debt under the statutory notice was undisputed, whether the company can raise cross-claim or counterclaim of an amount equivalent to or more than the debt in answer to the demand to justify the grant of an injunction to restrain the presentation of the winding up petition; and (c) whether the plaintiff has established a bona fide cross-claim or counterclaim on substantial grounds.

Held, allowing the application with costs of RM20,000:

(1) Even after the High Court had issued a judgment in terms of the adjudication decision with interest and cost, there was no 'judgment by a court of law' although it was possible to enforce the adjudication decision which would be treated as if it was a judgment if the various modes of execution under the rules on execution of the orders or judgments of the High Court were deployed. For the purposes of such executions, the adjudication decision was treated as if it was a judgment, was an undisputed debt. Both the arbitration award under the Arbitration Acts and the adjudication decision under the CIPAA, upon the court making the judgment, such judgment was equivalent to a judgment by a court of law. The arbitration award or the adjudication decision did not merge into the judgment and remained capable of being stayed and or set aside. The adjudication decision continued to bind the parties until the dispute was finally decided by arbitration or the court under s 13 of the CIPAA. The judgment dated 4 February 2020 that the defendant obtained under s 28 of the CIPAA was a valid and enforceable judgment was an undisputed debt and was capable of forming the basis for a presentation of a winding up petition against the plaintiff (see paras 18, 20 & 44).

(2) The plaintiff had established through its affidavit filed and the exhibits thereto that its cross-claim or counterclaim was based on substantive grounds and that it was in excess of the amount stated in judgment relied

upon in the statutory notice. There was a likelihood that the intended winding up petition might fail or that it was unlikely that a winding up order will be made. The cross-claim or counterclaim raised by the plaintiff were bona fide and based on substantial grounds. The defendant was not entitled to present a winding up petition based on the statutory notice (see paras 55 & 57).

(3) Notwithstanding the fact that the plaintiff had filed the originating summons on 12 March 2020, the defendant had engaged another firm of solicitors and proceeded to present the winding up petition disregarding the plaintiff's prayers in the present action. It would be a grave injustice to the plaintiff if the plaintiff, by reason of the defendant's presentation of the winding up petition, was precluded from seeking the injunction as prayed and had to make a fresh application before the winding up court for the same. It was an exceptional case to justify the court to make the order for an injunction in terms of prayers 4(i) and (ii) of the originating summons notwithstanding that the winding up petition was filed (see paras 60–61).

[Bahasa Malaysia summary

Melalui surat penerimaan bertarikh 31 Julai 2018 dan perjanjian subkontrak bertarikh 22 Januari 2019 ('subkontrak tersebut'), plaintif telah melantik defendan sebagai subkontraktornya untuk satu projek yang dikenali sebagai 'Pavement Works (WP700) for Proposed Lebuhraya Putrajaya to KLIA (MEX II) — Commencing from Putrajaya Interchange and Terminating at KLIA'. Dalam pelanggaran subkontrak tersebut, plaintif telah gagal membayar kepada defendan sejumlah RM8,848,865.04 di bawah sijil pembayaran interim No 2 hingga 7, yang kesemuanya diperakui dan dikeluarkan oleh plaintif kepada defendan untuk kerja-kerja siap berdasarkan subkontrak. Oleh kerana tiada bayaran secara berulang kali dibuat oleh plaintif, dan apabila penyerahan tuntutan pembayaran oleh defendan pada 22 April 2019 dan maklum balas pembayaran oleh plaintif pada 7 Mei 2019, defendan memulakan prosiding adjudikasi di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta') terhadap plaintif dan notis adjudikasi telah disampaikan oleh defendan kepada plaintif pada 21 Mei 2019. Semasa prosiding adjudiskasi, defendan memilih untuk menerima penolakan subkontrak oleh plaintif bagi pelanggaran secara berulang kali tanggungjawab pembayarannya di bawah subkontrak tersebut. Plaintif mengeluarkan notis timbang tara bertarikh 20 Ogos 2019 kepada defendan. Prosiding timbang tara antara pihak-pihak kini berada di peringkat di mana seorang penimbang tara akan dilantik oleh Pusat Timbang Tara Antarabangsa Asia ('AIAC'). Pada 21 Ogos 2019, adjudikator yang bijaksana memberikan keputusannya ('keputusan adjudikator') yang memihak kepada defendan. Oleh kerana kegagalan plaintif dalam mematuhi keputusan adjudikator, defendan telah memohon untuk menguatkuasakan keputusan adjudikator di Mahkamah Tinggi Pembinaan di Kuala Lumpur

('Mahkamah Tinggi Pembinaan') bersesuaian dengan s 28 Akta. Pada 4 Februari 2020, Mahkamah Tinggi Pembinaan membenarkan saman pemula defendan No WA-24C-191–09 Tahun 2019 ('SP 191') bagi menguatkuasakan keputusan adjudikasi sepertimana ianya adalah keputusan atau perintah oleh Mahkamah Tinggi dengan faedah dan kos ('penghakiman tersebut'). Pada masa yang sama, saman pemula plaintif WA-24C198–10 Tahun 2019 dan WA-24C-199–10 Tahun 2019 ('SP 198 dan 199') untuk mengetepikan dan menggantung keputusan adjudikasi berdasarkan ss 15 dan 16 Akta kedua-duanya ditolak oleh Mahkamah Tinggi Pembinaan. Plaintif tidak merayu terhadap keputusan Mahkamah Tinggi Pembinaan. Pada 20 Februari 2020, defendan melalui peguamcaranya mengeluarkan kepada plaintif notis statutori berdasarkan s 466(1) Akta Syarikat 2016 dengan menuntut sejumlah RM9,222,205.75. Saman pemula difailkan oleh plaintif yang dikenal sebagai injunksi Fortuna untuk menghalang defendan dari, antara lain, memulakan petisyen penggulungan terhadap plaintif berdasarkan notis statutori tersebut. Isu perundangan untuk dipertimbangkan adalah: (a) sama ada penghakiman yang dikeluarkan oleh Mahkamah Tinggi berdasarkan s 28(2) Akta adalah 'hutang yang dipertikaikan' di mana terdapat prosiding timbang tara atau mahkamah secara serentak; (b) sekiranya hutang di bawah notis statutori tersebut tidak dipertikaikan, sama ada syarikat tersebut boleh mengemukakan tuntutan silang atau tuntutan balas untuk jumlah yang sama dengan atau lebih daripada hutang sebagai balasan kepada tuntutan dalam memberikan justifikasi pemberian satu injunksi untuk menghalang pengemukaan petisyen penggulungan; dan (c) sama ada plaintif telah membuktikan tuntutan silang atau tuntutan balas secara suci hati berdasarkan alasan yang kukuh.

Diputuskan, membenarkan permohonan dengan kos RM20,000:

(1) Walaupun setelah Mahkamah Tinggi mengeluarkan penghakiman sepertimana keputusan adjudikasi dengan faedah dan kos, tidak ada 'penghakiman oleh mahkamah perundangan' walaupun ianya adalah munasabah untuk menguatkuasakan keputusan adjudikasi yang mana akan dianggap seolah-olah sebagai penghakiman sekiranya pelbagai cara perlaksanaan di bawah peraturan perlaksanaan perintah atau penghakiman Mahkamah Tinggi diguna pakai. Bagi tujuan pelaksanaan seperti itu, keputusan adjudikasi dianggap sebagai penghakiman, adalah hutang yang tidak dipertikaikan. Kedua-dua keputusan timbang tara di bawah Akta Timbang Tara dan keputusan adjudikasi di bawah Akta, setelah mahkamah membuat keputusan, penghakiman tersebut adalah setara dengan penghakiman oleh mahkamah perundangan. Keputusan timbang tara atau keputusan adjudikasi tidak akan bergabung menjadi penghakiman dan masih boleh digantung dan atau diketepikan. Keputusan adjudikasi akan terus mengikat pihak-pihak sehinggalah pertikaian tersebut diputuskan oleh timbang tara atau mahkamah secara muktamad di bawah s 13 Akta. Penghakiman bertarikh 4 Februari 2020

yang diperoleh oleh defendan di bawah s 28 Akta adalah penghakiman yang sah dan boleh dikuatkuasakan adalah hutang yang tidak dipertikaikan dan mampu membentuk asas untuk mengemukakan petisyen penggulungan terhadap plaintif (lihat perenggan 18, 20 & 44).

(2) Plaintif telah membuktikan melalui afidavit yang difailkan dan ekshibit-ekshibitnya yang mana tuntutan silang atau tuntutan balasnya adalah berdasarkan kepada alasan yang kukuh dan bahawa ia melebihi jumlah yang dinyatakan dalam penghakiman yang diguna pakai dalam notis statutori. Terdapat kemungkinan bahawa petisyen penggulungan yang dimaksudkan mungkin gagal atau bahawa ianya adalah mustahil perintah penggulungan akan diberikan. Tuntutan silang atau tuntutan balas yang dikemukakan oleh plaintif adalah suci hati dan berdasarkan alasan yang kukuh. Defendan tidak berhak mengemukakan petisyen penggulungan berdasarkan notis statutori (lihat perenggan 55 & 57).

(3) Walaupun berdasarkan fakta bahawa plaintif telah memfailkan saman pemula pada 12 Mac 2020, defendan telah melantik firma peguamcara lain dan terus mengemukakan petisyen penggulungan tanpa mengambil kira permohonan plaintif dalam tindakan semasa. Ianya akan menjadi suatu ketidakadilan yang besar kepada plaintif sekiranya plaintif, berdasarkan pengemukaan petisyen penggulungan defendan, dikecualikan daripada memohon untuk injunksi sebagaimana yang dimohon dan perlu mengemukakan permohonan baru di hadapan mahkamah penggulungan untuk perkara yang sama. Ianya adalah kes yang luar biasa untuk memberikan justifikasi kepada mahkamah dalam membenarkan perintah injunksi sepertimana permohonan 4(i) dan (ii) saman pemula walaupun petisyen penggulungan telah difailkan (lihat perenggan 60–61).]

Cases referred to

ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd [2020] MLJU 282, HC (refd)

Barisan Performa Sdn Bhd v Hype Park City Sdn Bhd [2018] MLJU 10, HC (refd)

Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others [2007] 1 AC 508, PC (refd)

Foster Wheeler E & C (M) Sdn Bhd v Arkema Thiochemicals Sdn Bhd and another case [2015] MLJU 1952; [2015] 1 LNS 632, HC (refd)

Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd [2014] 11 MLJ 916, HC (refd)

Likas Bay Precint Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244, CA (refd)

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2018] 4 MLJ 496, CA (refd)

Metalform Asia Pte Ltd v Holland Leedon Pte Ltd [2007] SGCA 6, CA (refd)

Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd & Ors and another

suit [2018] MLJU 1912; [2018] 1 LNS 2078, CA (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (folld)
People Realty Sdn Bhd v Red Rock Construction Sdn Bhd [2008] 1 MLJ 453, CA (refd)
Permata Trans Offshore Sdn Bhd v New Wing Energy Sdn Bhd [2019] MLJU 922, HC (refd)
Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd) [2006] 2 MLJ 602, CA (refd)
Ridgeway Motors (Isleworth) Ltd v ALTS Ltd [2005] 2 All ER 304, CA (refd)
WWTAI Finance Ltd v IES Energy Holdings Sdn Bhd [2016] MLJU 1591, HC (refd)
Zalam Corp Sdn Bhd lwn Dolomite Readymixed Concrete Sdn Bhd [2011] MLJU 1552; [2011] 9 CLJ 705, CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005) s 27
Arbitration Act 2005 s 38(1)
Companies Act 2016 ss 456(1)(e), 465, 466, 466(1), 466(1)(b)
Construction Industry Payment and Adjudication Act 2012 ss 13, 15, 16, 28, 28(1), (2), (3), 37
Contracts Act 2002 [NZ] s 79
Rules of Court 2012 O 45

Edwin Lim (Masturina bt Rodzi with him) (Edwin Lim & Suren) for the plaintiff.
Oon Chee Kheng (Goh Jing Han with him) (CK Oon & Co) for the defendant.

Ong Chee Kwan JC:

[1] This judgment deals with the issue whether a judgment under s 28(2) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') which is relied upon as a debt in the statutory demand under s 466 of the Companies Act 2016 ('the CA 2016') is a 'disputed debt'. It also looks at whether a cross-claim or counterclaim for a sum equivalent to or more than the judgment debt is an answer to the statutory demand for the court to grant an injunction to restrain the presentation of a winding up petition.

BACKGROUND FACTS

[2] By way of a letter of acceptance dated 31 July 2018 and subcontract agreement dated 22 January 2019 ('the subcontract'), the plaintiff appointed the defendant as its subcontractor for a project known as 'Pavement Works (WP700) for Proposed Lebuhraya Putrajaya to KLIA ('MEX II') — Commencing from Putrajaya interchange and terminating at KLIA'.

A **[3]** In breach of the subcontract, the plaintiff failed to pay the defendant a total sum of RM8,848,865.04 under interim payment certificates No 2 to 7, all of which were certified and issued by the plaintiff to the defendant for works done pursuant to the subcontract.

B **[4]** Because of the plaintiff's repeated non-payments, and after the service of the payment claim by the defendant on 22 April 2019 and the payment response by the plaintiff on 7 May 2019, the defendant commenced an adjudication proceeding under the CIPAA against the plaintiff and the notice of adjudication was sent by the defendant to the plaintiff on 21 May 2019.
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[5] On 4 July 2019, in the course of the adjudication proceeding, the defendant elected to accept the plaintiff's repudiation of the subcontract for repeated breaches of its payment obligations under the subcontract.

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[6] In the light of the various issues arising between the parties, the plaintiff issued an arbitration notice dated 20 August 2019 to the defendant. The arbitration proceedings between the parties is currently at the stage where an arbitrator is to be appointed by the Asian International Arbitration Centre
E ('AIAC').

[7] On 21 August 2019, the learned adjudicator delivered his decision ('the adjudication decision') in favour of the defendant.

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[8] Due to the plaintiff's failure to comply with the adjudication decision, the defendant had sought to enforce the adjudication decision in the Construction High Court at Kuala Lumpur ('the Construction High Court') pursuant to s 28 of the CIPAA.

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[9] On 4 February 2020, the Construction High Court allowed the defendant's Originating Summons No WA-24C-191–09 of 2019 ('OS 191') to enforce the adjudication decision as if it is a judgement or order of the High Court with interests and costs ('the judgment'). At the same time, the plaintiff's
H Originating Summonses Nos WA-24C-198–10 of 2019 and WA-24C-199–10 of 2019 ('OS 198 & 199') to set aside and to stay the adjudication decision pursuant to ss 15 and 16 of the CIPAA were both dismissed by the Construction High Court.

I **[10]** The plaintiff did not appeal against the decisions of the Construction High Court.

[11] On 20 February 2020, the defendant by way of its solicitors issued to the plaintiff the statutory notice pursuant to s 466(1) of the CA 2016 claiming

for the sum of RM9,222,205.75 ('the statutory notice'). This statutory notice was premised on the judgment.

[12] The present originating summons is filed by the plaintiff for what is now known as a Fortuna injunction to restrain the defendant from, inter alia, commencing a winding up petition against the plaintiff pursuant to the statutory notice.

THE ISSUES

[13] The legal issues for consideration are as follow:

(a) whether a judgment issued by the High Court pursuant to s 28(2) of the CIPAA is a 'disputed debt' where there is concurrent arbitration or court proceedings?

(b) if the debt under the statutory notice is undisputed, whether the company can raise cross-claim or counterclaim of an amount equivalent to or more than the debt in answer to the demand to justify the grant of an injunction to restrain the presentation of the winding up petition; and

(c) whether the plaintiff has established a bona fide cross-claim or counterclaim on substantial grounds.

COURT'S DELIBERATION

[14] I shall first deal with the question whether the adjudication decision that has been made enforceable under s 28(2) of the CIPAA in the form of the judgment is an undisputed debt for the purpose of the presentation of a winding up petition under ss 465 and 466 of the CA 2016.

[15] In *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2020] MLJU 282, Darryl Goon J (as he then was) held as follows:

> [160] An adjudication decision, even one that has been ordered to be enforced as if it were a judgment or order of the High Court, is a disputable decision. Under s 28 of the CIPAA, an adjudication decision is not deemed to be a judgment of a court of law, the latter being not disputable. This is particularly so as the very nature of an adjudication decision is of 'temporary finality' or is only provisionally final.
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> [161] Although of temporary finality, an adjudication decision is nonetheless enforceable as if it were a decision or order of the High Court, if so ordered. In this regard enforcement would include all the modes of enforcement available under O 45 of the Rules of Court 2012. By the available modes of enforcement or execution, the objective of the CIPAA to secure early payment or to ease the creditor's cash flow is preserved.
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> [162] An adjudication decision may also be the basis for the issue of a statutory

notice under s 466(1) of the Companies Act 2016, even if not ordered to be enforced as if it were a judgment of the High Court.

[163] However, if a statutory demand is issued under s 466(1)(a) based on a debt or an adjudication decision (even one that has been ordered to be enforced as if it were a judgment of the court), but not based upon a judgment of a court of law, an injunction may issue to restrain the creditor from presenting a winding up petition, if the debt or adjudication decision is genuinely disputed upon substantial grounds or if there exists a genuine cross-claim, counterclaim or set off against the would be petitioner for an amount or amounts greater than the alleged debt upon substantial grounds.

[16] At the heart of the aforesaid judgment is the distinction made by His Lordship between a judgment or order made under s 28 of the CIPAA and 'a judgment by a court of law'. In coming to his conclusion, Darryl Goon J (as he then was) was very much influenced by the corresponding provisions under s 27 of the Arbitration Act 1952 and the current s 38(1) of the Arbitration Act 2005 which provide as follows:

Section 27 Arbitration Act 1952

An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the awards.

Section 38(1) Arbitration Act 2005

On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

[17] According to Darryl Goon J (as he then was) at paras 59–62 of his judgment, an adjudication decision, even after the same has been made enforceable under s 28(2) of the CIPAA, is not converted into a judgment of the court. This is what he said:

[59] Unlike the formula adopted in s 38(1) of the Arbitration (or s 27 of the Arbitration Act 1952), s 28 of the CIPAA does not provide that an adjudication decision may be entered 'as a judgment'. An application under s 28(1) is only for 'an order to enforce the adjudication decision *as if it is a judgment* or order of the High Court'. (Emphasis added.)

[60] The formulation adopted in s 28(1) does not provide for an adjudication decision being entered by the High Court 'as a judgment'. It only provides for the enforceability or enforcement of an adjudication decision 'as if it is a judgment'. It does not go so far as to deem or allow for an adjudication decision to be converted into a judgment of the court.

[61] Consonant with the objective of enforcement disclosed in s 28(2), s 28(3) of the CIPAA goes on to make it clear that an order by the court under s 28(2) ' … may

be executed in accordance with the rules on execution of the orders or judgment of the High Court'. (Emphasis added.)

[62] As an adjudication decision is not converted into a judgment of the court, it remains an adjudication decision even if an order is obtained under s 28 and as such, it is still subject to the provisions of the CIPAA.

[18] Thus, it would seem according to the said judgment, even after the High Court has issued a judgment in terms of the adjudication decision with interest and cost, there is no 'judgment by a court of law' although it is possible to enforce the adjudication decision which will be treated as if it is a judgment if the various modes of execution under the rules on execution of the orders or judgments of the High Court are deployed. For the purposes of such executions, the adjudication decision being treated as if it is a judgment, is an undisputed debt.

[19] With respect to the learned judge, in my mind, the distinction between the formulation '... judgment may be entered in terms of the award' or 'enforced by entry as a judgment in terms of the award or by action' under the two Arbitration Acts on the one hand and ' ... enforce the adjudication decision as if it is a judgment or order of the High Court' under the CIPAA on the other hand is a distinction without a difference.

[20] In my judgment, for all intents and purposes, both the arbitration award under the Arbitration Acts and the adjudication decision under the CIPAA, upon the court making the judgment, such judgment is equivalent to a judgment by a court of law. In both instances, the statutes provide for the arbitration award and the adjudication decision to be treated as equivalent to a judgment only for the purposes of enforcement of the arbitration award and the adjudication decision. The arbitration award or the adjudication decision does not merged into the judgment and thus remains capable of being stayed and or set aside. The adjudication decision continues to bind the parties until the dispute is finally decided by arbitration or the court under s 13 of the CIPAA.

[21] Insofar as the adjudication decision under the CIPAA is concerned, it is clear in s 28(2) of the CIPAA that the High Court when entertaining an application under s 28(1) is effectively making its *own* order as a court of law. In doing so, the High Court retains a power to either make an order in respect of the entire adjudication decision or merely a part of the adjudication decision (for example where there had been partial payments after the adjudication decision).

[22] In fact, s 28(2) further empowers the High Court to order interest on the adjudicated amount to be payable even if the adjudication decision does

not provide for the same. This must suggest that such judgment or order so made is a judgment or order of the High Court that is no different from any other judgments or orders that the High Court in the discharge of its judicial powers ordinarily makes. Undoubtedly, the High Court's powers to order interest and for that matter also the costs for the application will result in *additional* legal obligations imposed on the debtor which are not part of the adjudication decision. It cannot be the case that such orders are deemed as judgment or order of a court of law and yet, the orders made at the same breath in terms of the adjudication decision are not considered as judgment or order of a court of law.

[23] That the 'judgment or order of the High Court' so made under s 28(2) in fact carries the imprimatur of the judgment of the court of law is made beyond doubt if one were to look at the wordings of the judgment or order that is drawn up under the section which undeniably is expressed as an order made by the court. In the present case, the order is issued in the following terms:

> MAKA ADALAH DIPERINTAHKAN BAHAWA Keputusan Adjudikasi bertarikh 21.8.2019 yang diberikan oleh Adjudikator di Bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 dikuatkuasakan seolah-olah keputusan adjudikasi itu adalah Penghakiman atau Perintah Mahkamah Tinggi dimana Defendan perlu membayar kepada Plaintif seperti beikut:
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> (a) Jumlah sebanyak RM 8,848,865.04;
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> (b) Faedah pada kadar 5% setahum ke atas jumlah RM 8,848.865.04 dari 8.6.2019 sehingga tarikh penyelesaian penuh dan muktamad;
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> (c) Jumlah Kos Adjudikasi sebanyak RM 45,000.00; dan
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> DAN JUGA ADALAH DIPERINTAHKAN bahawa kos permohonan adalah sebanyak RM 5,000.00 tertakluk kepada bayaran fi alokatur.
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> (Emphasis added.)

[24] It is would be odd that a judgment or order made under s 28 of the CIPAA can be executed as an 'undisputed debt' in accordance with the rules of execution of the orders or judgments of the High Court and yet when the same judgment is relied upon for the purposes of s 466(1) of the CA 2016, the said judgment bears the quality of a 'disputed debt'. If it is a 'disputed debt' for the purpose of winding up, why should it not be a 'disputed debt' for the purposes of the execution under the rules of execution? In fact, if the High Court had ordered interest and costs in making the judgment and either the interest or the costs or the combined amount of the interest and costs so ordered were to exceed RM10,000, surely it cannot be said that such judgment cannot be relied upon as a basis for issuing a statutory notice under s 466(1) of the CA 2016 and to be treated as 'undisputed debt'?

[25] It is beyond challenge that the adjudication decision is only of

'temporary finality' since s 37 of the CIPAA provides that an adjudication proceeding, arbitration and court litigation may proceed concurrently and in parallel and this is to serve only the purpose of keeping the cash flow going for the contractors so that they would not be held to ransom by recalcitrant employers (see *Foster Wheeler E & C (M) Sdn Bhd v Arkema Thiochemicals Sdn Bhd and another case* [2015] MLJU 1952; [2015] 1 LNS 632, per Mary Lim J (as she then was) and *Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd & Ors and another suit* [2018] MLJU 1912; [2018] 1 LNS 2078, per David Wong Dak Wah CJSS). Further, s 13 of the CIPAA provides that an adjudication decision is only provisionally binding if there are concurrent arbitration or court proceedings or conditionally binding if there are none but there might be such proceedings to have the dispute finally determined.

[26] The aforesaid is relied upon as the basis to conclude that an adjudication decision though enforceable as if it were a judgment debt when ordered to be so, it is nevertheless disputable as it is still open to a party against whom the adjudication decision is given, to legally dispute the decision by way of arbitration or in court.

[27] Again, with respect, whilst there is a specific provision in the CIPAA stating that the adjudication decision is only temporarily binding, ie s 13, there is nothing in the CIPAA that provides that a judgment ordered by the High Court made in respect of the adjudication decision for *the purposes of enforcement* of the adjudication decision shall be treated as disputable for the purposes of winding up. On the contrary the very words ' … an order to enforce the adjudication decision as if it is a judgment or order of the High Court' in fact militate against such interpretation. These words in their natural and ordinary meaning suggest that the judgment or order so made will have all the features of a judgment or order of the High Court for the purposes of enforcement. This includes the 'undisputed' nature of an order or judgment, unless set aside.

[28] Further, the fact that the purpose of the CIPAA is to keep the cash flow going for the contractors, in my opinion, ought not to have any bearings on the issue relating to the *enforceability* of the judgment or order made under s 28(2) of the CIPAA. Most certainly is cannot and should not turn the character or nature of the said judgment or order from one that is an 'undisputed debt' when it comes to the execution of the same under the rules of the court to one that is a 'disputed debt' when it comes to the presentation of winding up.

[29] In fact, to treat the judgment or order as still 'disputable' will only adversely affect the 'enforceability' of such judgment or order to achieve the object of the CIPAA to address the cash flow issue for the contractors. In this connection, it is no coincidence that in none of the jurisdictions where

adjudication of construction disputes has been introduced, the enforcement of the adjudication decisions made in the form of a judgment precludes the right to present a winding up petition based on the same. The fact that adjudication decisions are only of temporary finality has not necessitated treating the judgment as 'disputable' when it is relied upon as the basis for the statutory demand for winding up. Indeed, in New Zealand, the provisions in their construction Contracts Act 2002, in particular s 79 thereto even precludes a court from taking into account counterclaims, set offs or cross demands save as provided, where judgment has been entered for the amount.

[30] In this regard, I note that under s 466(1)(b) of the CA 2016 provides as follow:

> 466(1) A company shall be deemed to be unable to pay its debts if:
>
> (a) The company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;
>
> (b) Execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;

[31] Let's assume for the moment that the judgment under s 28(2) of the CIPAA is only 'undisputed' for the purposes of execution proceedings taken under the relevant rules of the court. In the event that the execution or process issued under the said judgment or order is returned unsatisfied whether in whole or in part, would the judgment creditor be entitled to rely on s 466(1)(b) of the CA 2016 and deemed the debtor as being unable to pay its debts and present a winding up petition under s 456(1)(e) of the CA 2016 for the balance unsatisfied portion? Is the balance unsatisfied portion of the judgment or order under s 28(2) of the CIPAA to be treated as still 'disputable' in such a case?

[32] The learned judge in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* opined that the fact that an adjudication decision may be ordered to be enforced as a judgment of the court does not mean included in s 28 of the CIPAA is a statutory right of enforcement by way of winding up proceedings.

[33] The reasoning of the learned judge for his aforesaid opinion are set out in the following paras of his judgment:

> [78] A winding up petition, by its nature, seeks not to enforce a right of payment, be it under a judgment or an adjudication decision. It is not designed to realise

monies due or payable under a judgment debt. A winding up petition is quite the very antithesis of enforcement. It seeks, to the contrary. Rather than seeking payment, a petitioner invoking section 465(1)(e) of the Companies Act 2016, as in the current case, is in fact asserting that the company is unable to pay its debt, is insolvent and should be wound up.

[79] In my view, winding up petitions are not for the purpose of enforcement of either judgment or order of the High Court or an adjudication decision and thus not a form of enforcement within s 28(1) of the CIPAA.

[34] In other words, since s 28 of the CIPAA provides specifically only for the enforcement of the adjudication decision and since winding up petitions do not seek to enforce a right of payment, it must follow that winding up petitions are not included as a form of enforcement under s 28. Hence, whilst the judgment or order made under s 28(2) may be executed in accordance with the rules of execution of the orders or judgments of the High Court, it does not permit the presentation of a winding up petition.

[35] At the outset, it is necessary to treat this issue, namely, whether the winding up petition is excluded as a form of enforcement under s 28 of the CIPAA as separate and distinct from the issue whether such a judgment or order made under s 28 is a 'disputed debt'. The former deals with whether a winding up petition is a form of enforcement of a judgment or order and whether s 28 expressly confines the enforcement to only the various execution processes available under the rules of courts. The latter, on the other hand, deals with whether such judgment or order so made is still 'disputable'. In this respect, even the learned judge recognised that winding up petition may in some circumstances be commenced based on a debt that has arisen by virtue of an adjudication decision, whether ordered to be enforced by the court or otherwise (see para [82] of the judgment). Thus, where an adjudication decision is unchallenged and there is no pending action in court or in arbitration relating to the disputes, when the said adjudication decision is made enforceable under s 28 of the CIPAA, winding up petition may be commenced based on this judgment or order.

[36] Indeed, in *Likas Bay Precint Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244, the Court of Appeal held that an adjudication decision is capable of being the basis to present a winding up petition without the need for the same to be registered and enforced as a judgment. It will be odd then if an adjudication decision that is *not* enforced as a judgment under s 28 of the CIPAA can be a basis to present a winding up petition but if the same unchallenged adjudication decision is registered and enforced as a judgment under s 28(2) of the CIPAA, the statutory right to present the winding up petition is not available to the judgment on the ground that winding up petition is not a form of enforcement under the said section. Is the court to examine the underlying

adjudication decision under the judgment to determine if such a judgment is disputed or otherwise? I do not think that the court should go behind the judgment that it had made.

[37] While I agree that a petition of winding up is not execution, in my judgment, it is not correct to say that a petition of winding up is not a form of enforcement albeit a *sui generis* form. Mummery LJ in *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304 at p 311 aptly described the proceedings as follows:

> ... A winding up petition is neither (a) an action upon a judgment in the special sense of being designed to re-establish by legal proceedings the liability of the company to pay a judgment debt and obtain another judgment for it, nor (b) a process of execution of the judgment on which the petition is based. *It is sui generis, being in the nature of a wider legal proceeding available for the collective enforcement of the admitted or proved debts of the company for the benefit of the general body of creditors on a pari passu basis* (see, for example, *Re Lines Bros Ltd* [1982] 2 All ER 183 at p 194-195; [1983] Ch 1 at p 20). (Emphasis added.)

[38] Lord Hoffmann described a winding up proceedings in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 AC 508 at para 14 in these terms:

> The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of *collective execution* against the property of the debtors by creditors whose rights are admitted or established. That mechanism may vary in its details. For example, in personal bankruptcy in England, the assets of the bankrupt are vested in a trustee for realisation and distribution to creditors. So the mechanism operates by divesting the bankrupt of his property. In corporate insolvency, on the other hand, the insolvent company continues to be owner of its property but holds it in trust for the creditors in accordance with the provisions of the Insolvency Act 1986: see *Ayerst v C & K (Construction) Ltd* [1976] AC 167. In the case of personal bankruptcy, the bankrupt may afterwards be discharged from liability for his pre-bankruptcy debts. In the case of corporate insolvency, there is no provision for discharge. The company remains liable but when all its assets have been distributed, there is nothing more against which the liability can be enforced: see *Wright v Eckhardt Marine GmbH* [2004] 1 AC 147, p 155–156. At that point, the company is usually dissolved. (Emphasis added.)

[39] In fact, where the company is unable to pay its debts, a creditor is entitled to present a petition to wind up the company for a realisation of the company's assets so that the creditor may at least seek to recover a portion of its admitted and or undisputed debt on a *pari passu* basis. How can this not be considered as a form of enforcement of the judgment debt just because the proceedings result in the assets of the company being made available for the benefit of the other general creditors and the recovery is based on a *pari passu*

basis rather than direct and full realisation of the creditor's judgment debt? A

[40] The legal test to determine whether a company is unable to pay its debts is on a commercial basis ie whether the company can pay its debts when it is demanded. I can do no better than to cite the following passage from Mohd Nazlan JC (as he then was) in *WWTAI Finance Ltd v IES Energy Holdings Sdn Bhd* [2016] MLJU 1591 where he said: B

> In respect of the first, in any event, now settled law that the issue on the inability to pay debt is to be considered in commercial context, which is the neglect to pay current demands regardless of whether the debtor is in possession of assets which, if realized would permit it to discharge its liabilities. The test of commercial insolvency simply means that the respondent company is not able to meet current debts when they fall due (see *System Communication Sdn Bhd v Zabidin Sdn Bhd* [1999] 1 AMR 1187). It is cash flow solvency that matters. Not balance sheet solvency. C D

[41] Thus, even if the company may be solvent in the sense that its assets far exceed its liabilities, if the assets are illiquid, the company is still in law deemed as unable to pay its debts. Thus, a creditor is entitled to proceed to wind up the company with the view to a realisation of all the assets of the company to make the same available for the benefit of the collective body of general creditors to meet its debt, albeit on a pari passu basis. E

[42] The right to present a winding up petition is a statutory right. Whilst s 28(3) of the CIPAA makes express reference to the execution of the judgment or order made under s 28(2) in accordance with the rules on execution of the orders or judgments of the High Court, the said section does not preclude the judgment creditor's right to exercise its statutory right under the CA 2016 to present a winding up at all. In fact, s 28(3) of the CIPAA expressly uses the word 'may', suggesting that the execution processes under the rules of the court are not the only routes available for the enforcement of the judgment. F G

[43] If the conditions in s 466(1) of the CA 2016 are met, the law shall deemed the company as being unable to pay its debts and the party in whose favour the adjudication decision was made will be entitled to present a winding up petition based on the judgment or order. Of course this right can be challenged on the ground that the debt is being disputed and or that the company has a cross-claim for an amount equal or more than the debt. This challenge however has nothing to do with whether the winding up petition comes within s 28 of the CIPAA or otherwise. In the context of the present case, the challenge relates to the effect of 'the order or judgment' made by the court for the purposes of the enforcement of the adjudication decision ie whether the judgment can be said to be a 'disputed debt'. H I

[44] Accordingly and for the reasons above, I hold that the judgment dated 4 February 2020 that the defendant obtained under s 28 of the CIPAA being a valid and enforceable judgment is an undisputed debt and is capable of forming the basis for a presentation of a winding up petition against the plaintiff. This is in accordance with the decision by Ramly JCA (as he then was) in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 where His Lordship held:

> [28] The second principle established in the Fortuna case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.
>
> [29] The principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is no consequence whether or not it will cause irreparable damages to the company, if presented. A valid and enforceable judgment of court as in the present case (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

[45] In fact this was precisely the position taken by Mohamed Zaini J in *Barisan Performa Sdn Bhd v Hype Park City Sdn Bhd* [2018] MLJU 10. That was a case where the winding up petition was based on judgment obtained under s 28 of the CIPAA to enforce an adjudication decision. The company had sought to strike out the petition on the ground that it had a cross-claim that was bigger than the judgment obtained which was subject to an arbitration. The company argued that it should be allowed to pursue the arbitration first.

[46] The company's argument was rejected by the learned judge who had in reliance on *Pacific & Orient Insurance Co Bhd* held that a claimant is entitled to initiate winding up proceedings based on a judgment debt.

[47] However, just because the judgment under s 28(2) of the CIPAA is an undisputed debt does not mean that the s 466 statutory notice based on the same cannot be challenged. The question for consideration in this case is whether the plaintiff has any bona fide cross-claim that is an answer to the statutory notice and if so, whether such cross-claim has been established on substantial grounds.

[48] The legal principle relating to the claim of a cross-claim or counterclaim by the company in answer to a winding up petition filed is stated by our Court of Appeal in *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602 by Abdul Aziz Mohamad JCA and Zulkefli Makinudin JCA (as he then was) where they said:

> [19] It is not sufficient for a company facing a winding up petition to merely aver by affidavit the existence of a meritorious counterclaim and exhibit for proof the statement of defence and counterclaim, which is not evidence. Evidence is required. The company must set out in the affidavit the facts on which the counterclaim is based, giving the necessary details so as to lend earnestness and weight to their claim and so that the petitioner will have a fair opportunity to present his side of the story by affidavit and the court, by considering the affidavits, will be able to assess, without actually deciding it, whether the claim has weight or raises a serious issue.

[49] Although the legal principle above was cited in the context of an opposition to a winding up petition, the same principle must also apply in the context of an application for a Fortuna injunction. Indeed in *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2014] 11 MLJ 916 at para [49] of the judgment, Mary Lim J (as she then was) after dealing with all the relevant cases including *People Realty Sdn Bhd v Red Rock Construction Sdn Bhd* [2008] 1 MLJ 453, *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602, *Zalam Corp Sdn Bhd lwn Dolomite Readymixed Concrete Sdn Bhd* [2011] MLJU 1552; [2011] 9 CLJ 705 summarised the position in the following manner:

> [49] From the above cases, it can first of all be said that where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt demanded is generally refused. The arguments challenging the issuance of the s 218 notice should be also made in the winding up court. Otherwise, the only viable option is to pay up. *Secondly, where a debt is undisputed, an injunction may nevertheless be ordered where a genuine cross-claim based on substantial grounds is raised.* In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation. Thirdly, the burden of proof in both instance of disputed debt and undisputed debt is whether there is a likelihood that the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail.

[50] In so holding, Her Ladyship was clearly persuaded by the policy consideration stated by the Chief Justice of Singapore in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] SGCA 6 where His Lordship said as follows:

> ... The policy concerns may be stated to be as follows. First, a creditor who has an undisputed debt has a statutory right to file a winding-up petition against a company which has failed to pay the debt. It is not an abuse of process of the court for him to invoke his statutory right. Therefore, there is no basis for the court to restrain him from filing his petition. Secondly, as there is also no abuse of process even where the company claims it has a serious cross-claim on substantial grounds, the court should not prevent the petition from being filed but determine whether it should be stayed or dismissed on hearing the petition. Otherwise the company would be allowed to litigate the same issue twice, leading to unnecessary prolongation of such proceedings. Furthermore, such restraining orders have the

potential of defeating the rights of creditors who may not have the same financial resources as the company, thereby denying them equal access to the court after a pre-emptive strike.

82. In our view, we do not think that these matters outweigh the policy consideration that the commercial viability of a company should not be put in jeopardy by the premature presentation of a winding up petition against it where it has a serious cross-claim based on substantial grounds. Such a petition may adversely affect the reputation and the business of the company and may also set into motion a process that may create cross-defaults or cut the company off from further sources of financing, thereby exacerbating its financial condition. So long as the court is satisfied that on the evidence there is a distinct possibility that the cross-claim may exceed the undisputed debt, it should give the company the opportunity to prove its claim rather than to allow a winding-up petition to be filed, with all the normal consequences attendant upon the filing of such a petition. Businesses that have a chance of recovery should not be pushed into a state that makes it difficult for them to recover.

[51] In the instant case, the defendant has issued a notice pursuant to s 466(1) of the CA 2016 claiming for the sum of RM9,222,205.75 from the plaintiff. This is based on the adjudication decision dated 21 August 2019 allowing the defendant's claim in the sum of RM8,848,865.04 while the plaintiff's counterclaim was dismissed by the adjudicator. The defendant had proceeded under s 28 of the CIPAA to enforce the adjudication decision as if it is a judgment for the purposes of enforcing the same. It is trite that the factual findings of the adjudicator are not binding on either the High Court or the arbitration tribunal (see *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2018] 4 MLJ 496). In fact, it is not clear what the grounds were for the adjudicator's decision to dismiss the plaintiff's counterclaim.

[52] In opposing the statutory notice, the plaintiff claims that it has a cross-claim or counterclaim against the defendant a sum of RM26,479,208.04 which is a sum far in excess of the judgment comprising the following:

(a) over-certification in the sum of RM575,094;

(b) defects rectification costs in the sum of RM1,762,724.48;

(c) set off over materials stored off-site in the sum of RM3,181,034;

(d) additional costs incurred to engage a new subcontractor in the sum of RM17,545,084.56;

(e) interface claim by the bridge contractor in the sum of RM1,199,871; and

(f) overhead costs incurred by the plaintiff in the sum of RM2,215,400.

[53] In support of the cross-claim or counterclaim, the plaintiff has annexed to its affidavit its adjudication response dated 6 November 2019 which set out the various issues involved in the cross-claim or counterclaim, namely:

(a) whether there was a waiver of requirement to issue the security performance guarantee and the effect thereof;

(b) whether the agreement was lawfully terminated and the effect thereof;

(c) the determination on liabilities for defect rectification costs;

(d) the determination on liabilities for late completion of the project and acceleration costs incurred by the plaintiff;

(e) the determination on liabilities for materials stored off-site and not accessible by the plaintiff;

(f) the determination on liabilities for additional interface claim from the bridge contractor incurred by the plaintiff as a result of late completion of the works by the defendant; and

(g) additional overhead costs incurred by the plaintiff.

[54] As stated by Mary Lim J (as she then was) in *Josu Engineering Construction Sdn Bhd*, in determining whether an injunction should be issue, the test is whether the court in assessing the cross-claim or counterclaim based on the affidavit evidence before it, there is a likelihood that the intended winding up petition may fail or that it is unlikely that a winding up order will be made. In my mind, this will be met once the plaintiff is able to show that its cross-claim or counterclaim is bona fide and based on substantial grounds as determined by our Court of Appeal in *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)*.

[55] In my judgment, the plaintiff has established to the satisfaction of this court through its affidavit filed and the exhibits thereto that its cross-claim or counterclaim is based on substantive grounds and that it is in excess of the amount stated in judgment relied upon in the statutory notice. In particular but not limited to the same, there are substantial disputes relating to:

(a) whether the security performance guarantee ought to have been provided by the defendant to the plaintiff. Clause 2.4 of the subcontract makes express provision for the defendant to furnish the security and there is a real dispute as to circumstances and reasons for the said security being returned to the plaintiff;

(b) the plaintiff's claim for damages by way of additional costs that the plaintiff is required to bear by reason of having to engage third parties to complete the works arising from the defendant terminating the

subcontract. In respect of this claim, all that the defendant had averred in its affidavit is that the amount claimed is merely an estimate;

(c) the plaintiff's claim for overhead costs and prolongation costs arising from the delay of works by the defendant. Again the defendant merely disputes the quantum claimed by the plaintiff; and

(d) the plaintiff's claim relating to materials that are stored off- site which the plaintiff has no access and which the plaintiff claimed was wrongly certified as payable to the defendant.

[56] The plaintiff has also shown that under the terms of the subcontract, in particular cl 16.3.3(b), the plaintiff has a contractual right to reduce, withhold or defer payment where the plaintiff has a right of set off or deduction under the subcontract and to withhold payment to the defendant until the costs of execution, completion and remedying any defects, damages for delay in completion (if any) and all other costs incurred by the plaintiff have been established under cl 19.2.4.

[57] Accordingly, in my judgment there is therefore a likelihood that the intended winding up petition may fail or that it is unlikely that a winding up order will be made. The cross-claim or counterclaim raised by the plaintiff are bona fide and based on substantial grounds. Hence, I hold that the defendant is not entitled to present a winding up petition based on the statutory notice.

[58] However, this is not the end of the matter. Subsequent to the filing of enclosure 1 and before the hearing of the same, the defendant had on 6 July 2020 proceeded to file a winding up petition against the plaintiff based, inter alia, on the statutory notice under Companies (Winding Up) No WA-28NCC–514–07 of 2020 ('the winding up petition').

[59] I have in *Permata Trans Offshore Sdn Bhd v New Wing Energy Sdn Bhd* [2019] MLJU 922 held that where winding up proceedings have commenced before the winding up court, an application to restrain such winding up proceedings should be made before the winding up court, save in rare and exceptional cases where irreparable harm would be suffered by the company.

[60] In the instant case, notwithstanding the fact that the plaintiff had filed the present originating summons on 12 March 2020, the defendant had engaged another firm of solicitors and proceeded to present the winding up petition disregarding the plaintiff's prayers in the present action. It would be a grave injustice to the plaintiff if the plaintiff, by reason of the defendant's presentation of the winding up petition, is now precluded from seeking the injunction as prayed and has to make a fresh application before the winding up court for the same.

[61] Accordingly, I find that this is an exceptional case to justify this court to make the order for an injunction in terms of prayers 4(i) and (ii) of the originating summons notwithstanding that the winding up petition has been filed. I also award costs to the plaintiff fixed at RM20,000 to be paid by the defendant subject to the usual allocator.

Application allowed with costs of RM20,000 subject to allocator.

Reported by Mohd Kamarul Anwar